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In the Supreme Court of the United States

OCTOBER TERM, 1978

EXXON CORPORATION AND KERR-McGEE CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

GERALD P. NORTON
Deputy General Counsel

W. DENNIS CROSS
Assistant General Counsel

ARTHUR W. ADELBERG
Attorney
Federal Trade Commission
Washington, D.C. 20580

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 589 F. 2d 582.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1978. A timely petition for rehearing was denied on December 6, 1978 (Pet. App. 25a). The petition for a writ of certiorari was filed on January 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners provided assertedly confidential information to the Federal Trade Commission on the understanding that the Commission would give them reasonable notice, usually 10 days, before disclosing the information to third parties. The question presented is whether a court is authorized to hold in a case such as this that the Due Process Clause of the Fifth Amendment requires the Commission to give 10 days' notice before complying with a request by Congress for access to the information.

STATEMENT

1. In January 1975 the Federal Trade Commission issued subpoenas *duces tecum* to petitioners and several other companies in the uranium industry. The subpoenas sought information concerning the structure and organization of the industry, as well as information relating to reserves, production, and drilling on an individual mill and property basis. The information was sought to enable the Commission's staff to prepare a comprehensive study of the energy industry and a report for submission to Congress.

In June 1975 the Commission granted petitioners' requests to give the information confidential treatment. The Commission agreed that it would not disclose the information to a congressional subcommittee upon official request without giving petitioners 10 days' notice

where possible and otherwise "as much notice as can reasonably be given."[1] On this understanding, petitioners voluntarily complied with the subpoenas.[2]

In a letter dated April 30, 1976, Senator Hart, as Chairman of the Senate Subcommittee on Antitrust and Monopoly, requested that the Commission make available to the Subcommittee "at the earliest possible date" the data that the Commission had gathered on coal and uranium holdings of oil companies (Pet. App. 6a; J.A. 62).[3] The purpose of this request was to acquire information that could assist the Subcommittee in considering a bill concerned with acquisitions by oil companies in other fuel areas. The request covered the

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[1]The Commission undertook for a period of three years, subject to certain exceptions, not to disclose petitioners' confidential information to any third party without first giving petitioners 10 days' notice of its intention to do so. One of the exceptions related to official requests from congressional committees or subcommittees or to courts in response to compulsory process. With respect to such disclosures, the Commission represented (J.A. 56) that:

> prior to furnishing such materials, [the Commission] will give [petitioner] ten days' notice where possible, and in any event as much notice as can reasonably be given, of such request in order to allow it an opportunity to apprise the committee, subcommittee, or court of the confidential nature of the requested material. Moreover, the Commission itself will advise the committee, subcommittee, or court that [petitioner] considers the material to be highly confidential.

"J.A." refers to the appendix filed in the court of appeals.

[2]By this time the Commission had made known, in another matter involving petitioner Exxon, that it considers that it has no authority to resist an official request by a congressional subcommittee for confidential information in its possession. See *FTC* v. *Texaco, Inc.*, 517 F. 2d 137, 141 n.4 (D.C. Cir. 1975), vacated en banc, 555 F. 2d 862, cert. denied, 431 U.S. 974 (1977).

[3]Appended to Senator Hart's letter was a letter from Senator Abourezk, a member of the Subcommittee, asking Senator Hart to make the request for the coal and uranium data on behalf of the Subcommittee (J.A. 61).

uranium data submitted by petitioners in response to the Commission's January 1975 subpoenas (Pet. App. 6a & n.3).

On May 5, 1976, the Commission notified petitioners (and a number of other companies that had received similar commitments) by telephone of the receipt of the request. On May 10, following communications from the Subcommittee indicating a need for immediate access to the uranium information,[4] the Commission formally determined to grant the request and to make the information available the next day. The Commission's staff again notified petitioners and the other companies to which it had promised prior notice of the release of confidential data (Pet. 6).

The next day petitioners filed complaints in the United States District Court for the District of Columbia. They sought a permanent injunction prohibiting disclosure to the Subcommittee, as well as injunctive and declaratory relief prohibiting future disclosures "to any third party" without 10 days' advance notice.

The district court denied petitioners' requests for injunctive and declaratory relief and dismissed the complaints (Pet. App. 1a-2a).[5] In connection with petitioners' request for an injunction requiring 10 days' advance notice of all future intended disclosures to any third party, the court stated (J.A. 84-85) that

[4]The precise contents of these communciations are not in the record; the cases were decided by the district court on motions to dismiss, and the complaints did not put in issue the validity of the Subcommittee's immediate demand for the information.

[5]Petitioners obtained temporary restraining orders preventing the disclosures; these remained in effect for more than a year, until the Chief Justice denied a stay pending appeal. *Exxon Corp.* v. *FTC*, No. A-930 (May 23, 1977).

> to impose a strict 10-day requirement * * * would be to limit improperly the right of Congressional subpoena, which while not exactly the same as a judicial subpoena, I think should be governed by the same considerations. And it seems to me further that there can be situations where a Congressional committee would be entitled to subpoena or to request a matter forthwith, and where a failure to respond to such would be an improper act or failure of duty on the part of the agency holding such information.

2. The court of appeals affirmed (Pet. App. 3a-24a). The court held that the imposition of a requirement that the Commission in all cases provide 10 days' notice to submitters of confidential information prior to disclosing such information to Congress "could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality" (*id.* at 11a). The court added (*ibid.*):

> While normally reasonable advance notice can be required, in exigent circumstances Congress has full authority to issue forthwith subpoenas and formally request immediate disclosure. To impose a mandatory notice period would skirt dangerously close to being at least the temporary "equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate * * *," *United States* v. *American Tel. & Tel. Co.*, 551 F. 2d 384, 388 (D.C. Cir. 1976), *citing, Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 506 (1975).

Rejecting petitioners' argument that disclosure of confidential information to the Subcommittee could be equated with public disclosure, the court observed that the Commission and the court could rely on the assumption that congressional committees will deal

responsibly with confidential business data revealed to them (Pet. App. 13a, 15a, 16a, 23a). Accordingly, the court held that disclosure to Congress "does not in itself impair the value of the trade secrets involved," so that there is no deprivation of property prior to which a hearing is constitutionally required (*id.* at 12a-13a).

The court observed that, in the event the Commission did not satisfy its obligations or there were improper "leaks" or disclosure to the public, appropriate remedies might be available (Pet. App. 16a-17a). In particular, the court stated that when it disclosed "trade secrets" to Congress, the Commission should advise that Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), prohibits the Commission from making such information "public" (Pet. App. 17a), and that it should satisfy itself that the official request is properly made in aid of an authorized inquiry (*id.* at 21a-22a).

ARGUMENT

1. Petitioners characterize the question presented by this case as being whether, after a private party has been compelled by a federal agency to turn over confidential information and "someone connected with Congress" asks the agency to disclose the information, the agency can freely release the information without giving the private party notice and an opportunity to seek judicial relief (Pet. 2-3). This case, however, does not present that question. First, petitioners were not "compelled" to give confidential information to the Commission; they did so voluntarily, with the understanding that the Commission would provide them with prior notice of any disclosure to Congress.[6]

[6]As we have noted (pages 2-3, *supra*), petitioners provided the information in response to a subpoena, but not as the result of enforcement proceedings. Instead, the information was provided pursuant to a negotiated agreement that included the confidentiality provision quoted at note 1, *supra*.

Second, this case does not deal with requests for disclosure simply by "someone connected with Congress;" it concerns only the "official requests" of congressional committees or subcommittees.[7] Third, the decision of the court of appeals does not give federal agencies "unfettered power" to make such disclosures without advance notice or free agencies "to 'moot' the question of the propriety of a disclosure in every case if it wants to do so" (Pet. 3, 21). The Commission is obliged by its commitments to give petitioners 10 days' notice where possible and otherwise as much notice as is reasonably possible, and also to inform the requester that the information is deemed highly confidential. Those commitments were satisfied in this case; petitioners received advance notice, and that notice enabled them to block disclosure for more than a year (see note 5, *supra*). Fourth, the court of appeals held that, when trade secrets are involved, the Commission should satisfy itself that the official request is part of an authorized inquiry and should advise the committee or subcommittee that Section 6(f) prohibits the Commission from making such information public.

Given the posture of this case, petitioners' argument must reduce to this: (1) the Court should declare they should have been given more notice than they received—and more notice than they agreed to accept—even though the notice given in this case was

[7]As the court of appeals noted, "in light of the fact that the Commission was formed in part to act as an arm of the legislature" (Pet. App. 18a n. 18), and "because of the relationship of its functions to those of Congress" (*id.* at 6a-7a), the Commission has made clear that it treats "official requests" of congressional committees or subcommittees as equivalent to subpoenas. The Commission, however, does not give comparable treatment to requests of "an individual member of Congress" even if he or she happens to be a "committee chairperson" (Pet. 2). Instead, consistent with the decision below (Pet. App. 21a, 22a-23a), such requests are treated like requests by any member of the public. See *Ashland Oil, Inc.* v. *FTC*, 409 F. Supp. 297, 300 (D. D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).

sufficient to enable them to obtain judicial relief; and (2) the Court should order the Commission to provide 10 days' prior notice with respect to any future disclosures of their confidential information, even though there is no reason to suppose the Commission will not continue to abide by its commitment to give petitioners either 10 days' notice or as much notice as can reasonably be given. In this context, as the court of appeals correctly held, there is no basis for granting petitioners the equitable relief they seek. Accordingly, this case presents no occasion for determining whether the Due Process Clause sometimes imposes on a federal agency an obligation to give prior notice of an impending disclosure of confidential information submitted to the agency by a private party.

2. Contrary to petitioners' contention (Pet. 11-15), the decision below does not conflict with any decision of this Court or of any other court of appeals.

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), on which petitioners most heavily rely, does not support their position. In that case a political organization sought to enjoin members of Congress from enforcing a subpoena that called for a bank to produce all documents relating to the organization's account. The organization claimed that the subpoena was invalid and that the mere disclosure of the information to Congress would infringe its First Amendment rights. This Court held that an injunction against Members of Congress and their staffs violated the Speech or Debate Clause. The Court did not address the question whether an injunction could have been obtained to prohibit the bank from complying

with the subpoena,[8] and it did not consider whether any part of the Constitution required the bank to give notice of its intention to comply with the subpoena.[9]

Similarly, *Chrysler Corp. v. Brown*, No. 77-992, argued Nov. 8, 1978, presents no question about the requirement of notice prior to releasing documents. In that case the agency's regulations assured prior notice

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[8]Petitioners, agreeing with Judge Wilkey (Pet. App. 29a-30a), argue that *Eastland* both requires advance notice and permits a court to forbid compliance with a subpoena, so long as the relief does not name any Member of Congress. The two portions of the opinion on which they rely (421 U.S. at 496 n.9, 501 n.14) do not support that position. Note 9 states that the court of appeals entered an injunction pending appeal in view of the potential for irreparable injury, but this Court held that the court of appeals' injunction was unconstitutional. Note 14 states that the district court properly "entertained" the action and that "the Court of Appeals saw" an important difference between subpoenas seeking information directly from a party and subpoenas seeking the same information from a third party. The first part of the footnote simply recognizes that the Speech or Debate Clause is not a limit on the Article III jurisdiction of the federal courts; it has "never been read so broadly that legislators are 'absolved of the responsibility of filing a motion to dismiss'" (421 U.S. at 511 n.17, quoting from *Powell* v. *McCormack*, 395 U.S. 486, 505 n.25 (1969)). The second part of note 14 recounts the view of the court of appeals; this Court did not suggest that third-party subpoenas would be treated differently from the case before it. It could not so suggest, because *Eastland* itself involved a third-party subpoena. It may well be that there is judicial power to enjoin a private party from complying with a congressional subpoena in a proper case, but *Eastland* takes no position on that question. The principal support for that proposition is dicta in *United States* v. *American Tel. & Tel. Co.*, 567 F. 2d 121 (D.C. Cir. 1977), a case decided by the same court of appeals that denied relief to petitioners. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[9]Indeed, because the bank's decision to comply was not governmental action, the Constitution could not have imposed direct restraints on the decision. *Subsequently*, in *United States* v. *Miller*, 425 U.S. 435 (1976), the bank failed to inform the respondent prior to disclosing information to the government about his account, an omission that the Court characterized as "without legal consequences" in that case. *Id.* at 443 n.5. See also

of the impending release of documents in response to a Freedom of Information Act request action, and the company in fact received five days' notice.

Nor is there any conflict with cases holding that in some circumstances due process requires notice and an opportunity to be heard before a person can be deprived of property. As the court of appeals correctly observed, the Commission's disclosure of information to a congressional subcommittee does not constitute public disclosure and thus does not in itself injure petitioners or deprive them of a protected property interest in the information (Pet. App. 13a n.14).[10] In any event, petitioners received prior notice in this case and were able to obtain an order barring the Commission from complying with the congressional subcommittee's demand for the information (Pet. App. 7a). With respect to the information requested by the congressional subcommittee, petitioners thus received the notice and opportunity for judicial review that they contend should be guaranteed under the Due Process Clause.

With respect to information that Congress has not requested, the court of appeals noted that petitioners' claim presents an "essentially abstract questions" (Pet. App. 9a-10a). Because petitioners had sufficient notice in this case to secure prior judicial review of the proposed release of the information, the court observed that "the

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Reporters Committee for Freedom of the Press v. *American Tel. & Tel. Co.*, No. 76-2057 (D.C. Cir. Aug. 11, 1978), cert. denied, No. 78-774 (Mar. 5, 1979).

[10]Accord, *FTC* v. *Anderson*, 442 F. Supp. 1118, 1124 n.5 (D. D.C. 1977), appeal pending, Nos. 78-1032, 78-1048 (D.C. Cir.); Rosenthal & Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 Harv. J. Legis. 74, 113-114 (1977).

fact pattern before this court is a particularly inappropriate one in which to evaluate the damage that might result if a company were unable to obtain judicial review before disclosure" (Pet. App. 9a n.11). In this context, the court of appeals properly declined to "establish[] any broad principle limiting the Commission's actions" (Pet. App. 10a).

Moreover, the court correctly concluded that a prospective "10-day notice" order binding on the Commission in any future responses to official congressional investigations would "skirt dangerously close to being at least the temporary 'equivalent to an order quashing [the official request or subpoena]' " (Pet. App. 11a) and hence would raise serious constitutional issues. See *Eastland* v. *United States Servicemen's Fund, supra,* 421 U.S. at 506, 511. This case is therefore readily distinguishable from *FTC* v. *Texaco, Inc.*, 555 F. 2d 862 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977), in which the court expressly disclaimed adopting a general 10-day notice rule but adopted, for that case, the notice proposal that had been advanced by the Commission itself, even though that proposal had been offered as a basis for settlement. 555 F. 2d at 884 n.64 (see Pet. App. 14a).[11]

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[11]In any event, intra-circuit conflicts are for the courts of appeals, not this Court, to resolve. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MICHAEL N. SOHN
General Counsel

GERALD P. NORTON
Deputy General Counsel

W. DENNIS CROSS
Assistant General Counsel

ARTHUR W. ADELBERG
Attorney
Federal Trade Commission

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